IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 10-0084

BRADLEY HOWARD/HOWARD FAMILY 1995 TRUST,

Appellant and Third-Party Respondent,

v.

SHELLY WEIDOW,

Appellee and Petitioner,

v.

UNINSURED EMPLOYERS' FUND,

Appellee and Respondent/Third-Party Petitioner.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Workers' Compensation Court,
The Honorable James Jeremiah Shea
Cause No. WCC No. 2007-1863

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STATEMENT OF THE ISSUES

1. Whether the Workers' Compensation Court ("WCC") erred when it concluded § 39-71-520(2), MCA (2005), was unconstitutionally void for vagueness.

2. Whether the WCC erred when it concluded that Weidow's employment did not fall under the exception to workers' compensation coverage for casual employment, as defined in § 39-71-116(6), MCA.

STATEMENT OF THE CASE

This appeal arises out of a determination made by the Uninsured Employers' Fund ("UEF") that Appellee Shelly Weidow's employment was casual as defined by § 39-71-116(6), MCA (2005), when he was working to complete a vacation home owned by Appellant Brad Howard through the Howard Family 1995 Trust (the "Trust"). Weidow sustained an injury to his head and upper body while aligning a dumbwaiter in June 2006.

Weidow timely requested mediation to challenge the UEF's determination, and the parties mediated the dispute. The mediator issued her report and recommendation favorable to Weidow and mailed it on January 31, 2007. On February 21, 2007, both Weidow and the UEF timely sent letters to the mediator: Weidow notified the mediator that he accepted her recommendation. The UEF, however, stated that no additional information provided during the mediation

reversed its earlier decision denying benefits based on its determination of casual employment. Additionally, because the UEF had not received any information that the claim was settled per the mediator's recommendation, it stated it would continue to deny liability for the claim.

On April 10, 2007, Weidow untimely filed his petition to the WCC to appeal the UEF's determination that he was casually employed. Section 39-71-520(2), MCA, requires a party to file a petition "within 60 days of the mailing of the mediator's report[.]" § 39-71-520(2), MCA (2005). Weidow filed his petition 69 days after the mailing of the mediator's report.

The UEF filed a motion to dismiss Weidow's claim because Weidow failed to petition the WCC within the time period provided by statute. Weidow opposed the motion on several grounds. The WCC deemed the UEF's motion a motion for summary judgment and denied the motion, finding § 39-71-520(2), MCA, void because it is unconstitutionally vague. The WCC held § 39-71-520(2), MCA,

> can reasonably be interpreted to mean that either the UEF's determination or the mediator's report become final if a petition is not filed within 60 days, and individuals of ordinary intelligence must necessarily guess at this section's meaning. A claimant who disagreed with the UEF's determination but accepted the mediator's report may well be confused as to whether he must petition the WCC for resolution or whether he can just wait 60 days for the mediator's report to become final. Section 39-71-520(2), MCA, therefore violates due process by its vagueness.

(Order ("Order"), at ¶ 25 (Dec. 31, 2008) (attached at App. 1)). This issue was listed as an issue for trial in the final pretrial order, and thus was properly preserved for appeal.

A WCC trial was held on May 4 and 5, 2009, to address the issues presented as set forth in the Final Pretrial Order, dated May 4, 2009. The WCC ruled on all of the issues presented for resolution. The WCC found Weidow's employment was not casual and he was entitled to medical benefits from the UEF. Specifically, the WCC concluded:

> Howard's use of the Yellowstone Club property, particularly in his use of that property for advantageous tax purposes, was part of Howard's usual course of trade, business, profession, or occupation. Therefore, Weidow's work on that property was not "casual employment" within the meaning of § 39-71-116(6), and was not exempt from workers' compensation insurance coverage.

(Findings of Fact, Conclusions of Law and Judgment ("FFCL"), at ¶ 96 (Jan. 22, 2010) (attached at App. 2)). The WCC also ruled Howard and the Howard Family 1995 Trust was an employer of Weidow at the time of his injury and responsible for indemnifying the UEF for medical benefits paid to Weidow.

STATEMENT OF THE FACTS

I. Facts relevant to first issue.

Weidow was injured on June 13, 2006, while installing trim in Howard's residence. (Order, at ¶ 3a.) Weidow filed a claim for benefits in October 2006,

and the UEF denied liability. (Id.) The matter was mediated on January 4, 2007, and the mediator mailed her report and recommendation on January 31, 2007. (Id.) On February 21, 2007, Weidow's counsel mailed a letter to the mediator notifying her that Weidow accepted her favorable recommendation and was willing to negotiate a settlement based on the recommendation. (Id., ¶ 3b.) On February 21, 2007, the UEF sent the mediator a letter which stated no additional information provided during the mediation reversed its earlier determination denying benefits. (Id.) Additionally, the UEF stated because it had not received any information that the claim was settled per the mediator's recommendation, it would continue to deny liability for the claim. (Id.) Weidow then filed his petition in the WCC on April 10, 2007, 69 days after the mailing of the mediator's report. (Id.)

II. Facts relevant to second issue

A. Weidow's Accident

Howard is a trustee of the Howard Family 1995 Trust, which was created to own and operate real property, personal property, and hold other assets. (FFCL, at ¶ 5.) Howard purchased Lot 72 at the Yellowstone Club with Trust assets to build a residential home. (Id., ¶ 6.) Howard also used Trust assets to pay for the design and construction of a residential home on the lot. (Id.) In November 2004, Glenn Weidow began working for Howard's original contractor, William Brickowski/Northwest Timber Structures ("Brickowski") on the home. (Id., ¶ 8.)

Once finish work began on the home, Glenn recommended his brother, Petitioner and Appellee Shelly Weidow to Brickowski. (Id., ¶ 9.) Weidow began working for Brickowski on the Howard home on or about April 2005, and he was covered by Brickowski's workers' compensation policy. (Id., ¶ 10).

Howard ordered Brickowski off the job in February or March 2006 due to performance issues. (Id., ¶ 11.) At that time, Glenn estimated that Howard's home was about 90 to 95% complete. (Id.) Glenn arranged for Weidow and himself to continue working on the home to complete the cabinetry and finish work they had started with Brickowski. (Id., ¶ 12.) Glenn, Weidow, and Howard believed the remaining work could be completed relatively quickly, and they entered into an oral agreement to complete the job. (Id.) Howard continued to pay Glenn and Weidow the same wage as they earned from Brickowski, and Howard, through the Trust, paid them directly. (Id., ¶ 14.) Glenn told Howard how many hours each of them worked – on average about 40 hours per week – and Howard would send them each a check. (Id., ¶ 15.) The Howard home was the brothers' only job at the time. (Id.)

Finishing the home took significantly longer than any of the parties anticipated. (Id., ¶ 16.) Glenn assisted Howard by keeping the subcontractors on track, and he and Weidow worked on some "punch list" items which Brickowski normally would have completed. (Id.) Glenn became aware the dumbwaiter was

not working properly and intended to fix it. (Id., ¶ 18.) While testing and working on the dumbwaiter, Weidow's head and shoulder was caught in it, and he suffered injuries as a result of the accident. (Id., ¶¶ 18-19.)

B. Howard and his use of his vacation home.

Howard's primary residence is in Burbank, California. (Id., ¶ 31.) He manages real estate, both his own and property owned by others, through two corporations: Jackbilt, Inc. and Duke Enterprises, Inc. d/b/a Classic Properties. (Id.) Howard's father created Jackbilt, and it is now owned by a trust with interests belonging to Howard, his sister, and their respective children. (Id.) Jackbilt manages about 70 properties, both residential and commercial, and it employs general maintenance workers, but does not keep plumbers, electricians, or other tradesmen on its payroll. (Id.) Howard testified Jackbilt was not involved with the house in Montana. (Id.)

Howard also testified prior to 1981, he worked construction and carpentry and occasionally flipped homes. (Id., ¶ 32.) He also worked as a real estate agent and developed property until about 1996. (Id.) Since then, he has primarily managed property for Jackbilt, and he has worked as a real estate broker for Classic Properties. (Id.) Classic Properties is a real estate agency with one agent in addition to Howard. (Id.) Howard is its sole proprietor. (Id.) Howard testified Classic Properties was not involved with the house in Montana. (Id.)

The Trust was created to hold Howard's personal assets, including real estate, and is distinct from the trust which owns Jackbilt or Jackbilt's assets. (Id., ¶ 33.) Howard testified an attorney recommended he form a trust in the 1980s to hold his property. (Id.) The Trust is how Howard holds his personal assets, and he does not receive an annual tax benefit from it. (Trial Transcript, at 115:5-15 (excerpts attached as App. 3).) He holds his property and other assets in the Trust for inheritance tax purposes. (Id.)

Howard pays all his personal expenses out of the Trust, and he paid for all the labor and materials for his Montana vacation home out of the Trust account. (FFCL, ¶ 34.) Howard is the sole manager of the Trust's assets, and Howard and his wife are the trustees. (Id.) The trustees are empowered to retain and operate any investment property which the trustees acquire under the Trust, with profits or losses inuring or being charged to the Trust and not the trustees. (Id.) The Trust's assets include the Yellowstone Club property, Howard's home in Burbank, an office building in Burbank, a residential property in Ventura, California, an apartment building, a residential duplex, a condominium in Big Sky and commercial buildings (Id.) Its other assets include life insurance policies, an airplane, personal property, and several vehicles. (Id.)

Howard visits Montana primarily to ski. (Id., ¶ 35.) At trial, he estimated, since 2004, he usually came to Montana for a few days at a time in the winter with

occasional trips here at other times of the year, equaling about 20 to 30 days per year. (Id.) Howard acquired the Big Sky condominium in 2004 through a property trade. (Id., ¶ 36.) At that time, he already owned the Yellowstone Club lot, but he had not yet decided to build on it. (Id.) Howard's wife was not enthusiastic about building a home there, so he used the condominium while trying to convince her to build a vacation home. (Id.) Howard acquired the condominium through a 1031 exchange, which requires renting the residence. (Id., ¶ 37.) However, he did not initially rent the condominium. (Id.) Until the completion of his vacation home, Howard maintained the condominium for personal use and occasionally allowed friends to use it, who would cover incidental expenses. (Id.)

Howard's wife, Deborah, testified at trial, and the WCC found her credible. (Id., ¶ 54.) She testified that the family uses the Montana house as a vacation home and it was built for that purpose. (Id.) She stated the Howards never planned to use the property as a rental. (Id.)

George McNee, a long-time friend of Howard's, also testified at trial, and the WCC found him credible. (Id., ¶ 55.) Howard first learned about the Yellowstone Club when he was invited to ski there with McNee. (Id.) McNee has stayed at Howard's vacation home as a guest on many occasions, and he does not believe Howard ever intended to use the property as a rental. (Id.)

David Scott was also found to be a credible witness at trial. (Id., ¶ 56.) He lives in Belgrade, Montana, and he has worked on the Architectural Review Committee of the Yellowstone Club since 2004 dealing with contractor compliance. (Id.) Scott testified Howard's home was never referred to as a spec home in his architectural plans, but always as the Howards' residence. (Id.) Scott also stated many of the specific elements included in Howard's home design, including materials which required special approval from the Committee, spoke to Howard's intention to use the property as a family home. (Id.) Scott reasoned someone building a spec home would have used less expensive, pre-approved materials instead of fighting for approval of expensive, customized elements and materials. (Id.) Scott issued a letter of substantial completion of the home on May 4, 2006, and he estimated at that time it was about 90% completed and habitable. (Id., ¶ 57.)

Charlie Callendar, who is the director/vice president of marketing and sales for the Yellowstone Club, testified at trial and was found to be credible. (Id., ¶ 58.) He is also the broker for the Club and his "team" handles all real estate transactions within the Club. (Id.) He testified Howard was not listing his home there for resale, and Howard has not listed the home as available for rent. (Id.)

C. Tax treatment of the vacation home.

Howard uses an accountant, Lawrence Becker, to prepare his tax returns. (Id., ¶ 48.) Howard testified he told Becker the lot was purchased with the intent to use it as a vacation home, and he left it up to Becker as to how to deal with it for tax purposes. (Id.) However, Becker originally placed the property on Schedule E of Howard's 2004 and 2005 tax returns. (Id., ¶ 77.) Schedule E is used to report activity in rental properties. (Id., ¶ 61.)

Howard did not take any deductions during 2004 for costs incurred on the Montana property. (Id., ¶ 49.) Howard was unaware that he received any additional tax benefit for listing the property on Schedule E instead of Schedule A because he was subject to the alternative minimum tax. (Id.) Becker transferred the vacation home off Schedule E for his tax returns beginning in 2006, but he did not correct his 2004 and 2005 returns. (Id., ¶ 51.) The total tax benefit Howard received from erroneously listing the property on Schedule E in 2004 and 2005 was approximately $2,000. (Id., ¶ 64.)

Howard also owns an airplane which is registered to his Montana vacation home address. (Id., ¶¶ 52-53.) His tax returns indicate the airplane is used 60% for business use and 40% for personal use. (Id., ¶ 52.) Howard took delivery of his airplane in September 2004 in Montana. (Id., ¶ 53.) He did not take the plane to California for several months after purchasing it to avoid paying sales taxes on

it. (Id.) The plane remains registered in Montana, and it is housed in a hangar in Big Sky. (Id.)

The WCC heard testimony from two accountants during trial: Cynthia Utterback and Becker. (Id., ¶¶ 59, 68.) The WCC found Ms. Utterback credible. (Id., ¶ 59.) However, after raising *sua sponte* this Court's holding in *Bonamarte v. Bonamarte*, 263 Mont. 170, 866 P.2d 1132 (1994), and in spite of no objection from Weidow, the WCC found it could not "truly assess [Becker's] credibility as a witness" because he testified telephonically.[1] (Id., ¶¶ 68-73.) The WCC therefore assigned less weight to Becker's testimony and was not "wholly persuaded by Becker's explanations as to why he treated the Montana vacation home as a rental property on Howard's 2004 and 2005 tax returns." (Id., ¶ 73.) Both Utterback's and Becker's testimony were based on Howard's 2004, 2005, and 2006 tax returns and on Becker's affidavit, filed earlier in the proceedings. (See id., ¶¶ 60, 76-79.)

Becker explained that he has been providing tax services for Howard since the early 1980s. (Id., ¶ 74.) He typically receives Howard's tax information from Howard's bookkeeper and prepares Howard's returns from that information. (Id., ¶ 75.) Becker occasionally speaks to Howard directly while preparing his return, but usually speaks to Howard's bookkeeper or to another accounting firm which also does work for Howard. (Id.) Becker testified Howard's tax return is never

[1] While Howard believes the WCC's *sua sponte* application of this Court's holding in *Bonamarte* may have been improper absent an objection from Weidow or the UEF, Howard does not challenge the WCC's assignment of weight or credibility in this appeal.

filed by April 15 because it is large and complex, and because the information usually cannot be gathered in time to meet the April 15 deadline. (Id., ¶ 76.) Howard always requests an extension, and the return is usually filed a few days before the October 15 deadline. (Id.)

Utterback did not agree with several of Becker's statements in his affidavit. (Id., ¶ 61.) She could not understand why Becker would place the Montana vacation home on Schedule E if Howard never intended to use it as a rental property. (Id.) She also testified she had never seen an accountant place a property on Schedule E for the sole purpose of tracking the underlying basis. (Id., ¶ 62.) Utterback criticized Becker for stating the vacation home's placement on Schedule E was an error which was "corrected" in 2006 when the property was moved to Schedule A, when Becker did not make the actual correction by amending Howard's 2004 and 2005 tax returns. (Id., ¶ 66.)

Becker testified at the time he entered the vacation home on Schedule E of Howard's 2004 and 2005 tax returns, he was uncertain as to how Howard intended to use the property. (Id., ¶ 77.) He explained typically he has an opportunity to speak personally with clients to clarify property usage so as to properly list it on the tax schedules, but, in Howard's case, Becker did not always have the opportunity to clear up uncertainties due to the voluminous nature of his tax

returns. (Id.) Becker stated once he learned the vacation home was a personal residence, he promptly moved it from Schedule E to Schedule A. (Id., ¶ 78.)

STANDARDS OF REVIEW

Through this appeal, Howard seeks this Court's review of two separate WCC orders: (1) December 31, 2008 Order Deeming Respondent's Motion to Dismiss to Be a Motion for Summary Judgment, Denying the Motion for Summary Judgment, and Declaring § 39-71-520(2), MCA, to Be Unconstitutional, and (2) January 22, 2010 Findings of Fact, Conclusions of Law and Judgment. This case is governed by the version of the Workers' Compensation Act in effect at the time of the injury. *BeVan v. Liberty N.W. Ins. Corp.*, 2007 MT 357, ¶ 8, 340 Mont. 357, 174 P.3d 518.

This Court reviews the WCC's ruling on summary judgment *de novo*. *Boyd v. Zurich Am. Ins. Co.*, 2010 MT 52, ¶ 11, 355 Mont. 336, 227 P.3d 1026 (citation omitted). Accordingly, this Court must "determine whether there is an absence of genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 9, 353 Mont. 265, 222 P.3d 566 (citation omitted).

The issue decided on summary judgment involves a question of constitutional law. "The standard for reviewing conclusions of law is whether they are correct." *Id.*, ¶ 10 (citation omitted).

> "The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt."

Id. (quoting *Powell v. State Compen. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional "beyond a reasonable doubt." *Id.* If any doubt exists, it must be resolved in favor of the statute's constitutionality. *Id.*

This Court reviews the WCC's conclusions of law to determine whether they are correct. *Schmill v. Liberty Northwest Ins. Corp.*, 2009 MT 430, ¶ 8, 354 Mont. 88, 223 P.3d 842 (citations omitted). The Court reviews findings of fact to determine whether they are supported by "substantial credible evidence." *Id.* (citations omitted). "Substantial credible evidence is 'evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.'" *Id.* (quoting *Lanes v. Mont. State Fund*, 2008 MT 306, ¶ 16, 346 Mont. 10, 192 P.3d 1145).

SUMMARY OF ARGUMENT

The statute setting forth the time limit to appeal the UEF's determination of coverage, § 39-71-520(2), MCA (2005), is not unconstitutionally void for

vagueness. The WCC erred in concluding it was. Accordingly, Weidow's petition to the WCC was untimely and must be dismissed.

The WCC failed to give proper deference to the constitutionality of § 39-71-520(2), MCA (2005), and therefore did not apply the proper legal standard. Using the correct legal analysis, a reasonable construction of § 39-71-520(2), MCA, demonstrates it is constitutionally clear and unambiguous. *See Montana Media, Inc. v. Flathead County*, 2003 MT 23, ¶ 58, 314 Mont. 121, 63 P.3d 1129 (holding that "a term is not vague simply because it can be dissected or subject to different interpretations. This Court is required to uphold the constitutionality of a statute when that can be accomplished by a reasonable construction of the statute.") (internal citations omitted). Weidow failed to prove the statute's unconstitutionality "beyond a reasonable doubt." *Wing v. State*, 2007 MT 72, ¶ 12, 336 Mont. 423, 155 P.3d 1224. Accordingly, this Court must overturn the WCC's denial of summary judgment and dismiss Weidow's claim, because Weidow failed to meet the jurisdictional requirements necessary to file a petition with the WCC.

The WCC improperly applied the definition of "casual employment," as codified in § 39-71-116(6), MCA, to the facts of this case. The casual employment exception to workers' compensation coverage is analyzed on a case-by-case basis, and there is no determinative factor, such as favorable tax treatment, which

determines its application. *Colmore v. UEF*, 2005 MT 239, ¶ 22, 328 Mont. 441, 121 P.3d 1007.

The *Colmore* decision sets forth three factors relevant when considering the casual employment exception: (1) identifying the employer's "business" related to the injury, (2) whether the claimant was working in furtherance of that business, and (3) whether the employer had a profit motive in relation to that business. *Id.*, ¶¶ 29-32. Here, the WCC never made a finding regarding Howard's or the Trust's "trade, business, profession or occupation" in regards to the vacation home, much less in regards to Weidow's employment there. Moreover, the temporary and inadvertent placement of the vacation home on Schedule E of Howard's 2004 and 2005 tax returns, resulting in a fairly negligible $2,000 tax benefit over the course of two years does not outweigh the multitude of facts supporting the conclusion that the lot was purchased to build a vacation home without a profit motive.

These facts and others distinguish this case from *Colmore*, where the employer, who leased and ran an agricultural business, deducting all expenses as "business" expenses on his Federal Income Tax Return in the amount of $140,983 in one tax year, was running the ranch with a profit motive and hired the claimant to further his business interests when the claimant was injured. *Id.*, ¶¶ 28-31. Therefore, a correct application of the facts to the law shows Weidow does fall under the casual employment exception to workers' compensation coverage, as

defined in § 39-71-116(6), MCA, and Howard is not required to provide coverage under the Act.

ARGUMENT

I. The time limit to appeal as codified in § 39-71-520(2), MCA (2005), is not unconstitutionally void for vagueness, so Weidow's petition was untimely and must be dismissed

The WCC incorrectly found § 39-71-520(2), MCA (2005), "violates due process by its vagueness" and is therefore unconstitutional. (Order, ¶ 25.) The WCC reached this conclusion through its improper application of the legal standard used to examine the constitutionality of statutes. Under the proper legal standard, the language of § 39-71-520(2) is sufficiently clear and unambiguous to pass constitutional muster. Accordingly, while summary judgment was proper in that there are no genuine issues of material fact, the WCC's erroneous application of the law to those facts requires reversal. A proper application of the undisputed facts to the law mandates summary judgment in favor of the UEF and Howard.

A. The WCC did not apply the proper legal standard to evaluate a statute's constitutionality.

While the WCC did articulate the proper legal standard for evaluating a statute's constitutionality in its Order, it failed to apply that standard properly when it determined § 39-71-520(2) is unconstitutionally vague. The WCC stated "[g]enerally, a court assumes all statutes are constitutional and attempts to construe them in a manner that avoids unconstitutional interpretation. A party challenging a

statute must prove beyond a reasonable doubt that the statute is unconstitutional." (Order, ¶ 19.)

Under Montana law, statutes "carry a presumption of constitutionality" and "[t]he party challenging the statute carries the burden of proving the statute's unconstitutionality beyond a reasonable doubt." *Wing*, ¶ 12 (citation omitted). A non-criminal statute such as § 39-71-520(2) "is unconstitutionally vague if a person of common intelligence must guess at its meaning. We presume that a person of average intelligence can comprehend a term of common usage contained in a statute." *Id.* (citation omitted). Importantly, this Court does "not require 'perfect clarity and precise guidance' to uphold a statute's constitutionality. We deem a statute to be unconstitutionally vague if it specifies 'no standard of conduct' at all." *Id.*, ¶ 14 (internal citations and quotation marks omitted). Accordingly, "a term is not vague simply because it can be dissected or subject to different interpretations. This Court is required to uphold the constitutionality of a statute when that can be accomplished by a reasonable construction of the statute." *Montana Media, Inc.*, ¶ 58 (internal citations omitted) (emphasis added); *see also Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1991) (Thomas, J. concurring) ("A mere disagreement among litigants over the meaning of a statute does not itself prove ambiguity; it usually means that one of the litigants is simply wrong.").

While the WCC articulated the proper legal standard, it did not correctly apply it to the statute at issue here. The WCC concluded that § 39-71-520(2) has "at least two reasonable interpretations." (Order, ¶ 21.) This fact alone cannot form the basis of a finding of unconstitutionality. *See Montana Media, Inc.*, ¶ 58 (stating "a term is not vague simply because it can be . . . subject to different interpretations"). However, noting "competent counsel on both sides are capable of reaching conflicting interpretations of this statute[,]" the WCC concluded the statute "does not advance the public policy of providing a system that is designed to minimize the reliance upon lawyers and the courts to obtain benefits and interpret liabilities." (Order, ¶ 24.) Therefore, the WCC concluded § 39-71-520(2) "violates due process by its vagueness" and is unconstitutional. (Id., ¶ 25.)

A statute's failure to advance legislative goals and its capability to be interpreted in more than one way cannot alone, as a matter of law, render it unconstitutional "beyond a reasonable doubt." *Wing*, ¶ 12. Therefore, the WCC did not correctly apply the legal standard to evaluate a statute's constitutionality in this matter and its decision must be reversed.

B. Applying the proper legal standard, § 39-71-520(2), is not unconstitutionally vague.

Section 39-71-520, MCA (2005), states as follows:

> **39-71-520. Time limit to appeal to mediation – petitioning workers' compensation court – failure to settle or petition.** (1) A dispute concerning uninsured employers' fund benefits must be

appealed to mediation within 90 days from the date of the determination by the department or the determination is considered final.

(2) (a) If the parties fail to reach a settlement through the mediation process, any party who disagrees with the department's determination may file a petition before the workers' compensation court.

(b) A party's petition must be filed within 60 days of the mailing of the mediator's report provided for in 39-71-2411 unless the parties stipulate in writing to a longer time period for filing the petition.

(c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the determination by the department is final.

§ 39-71-520, MCA (2005).

The WCC held the language in subsection (2) is void for vagueness because of ambiguity in the phrase "determination by the department."[2] The WCC found where the UEF's decision is adverse to the claimant and denies benefits but the mediator's report and recommendation sets forth a plan for settlement of the claim, the "determination by the department" may be subject to more than one interpretation. Weidow submitted that both the UEF and the mediator are part of "the department." The WCC accepted this explanation, noting "[a] claimant who disagreed with the UEF's determination but accepted the mediator's report may well be confused as to whether he must petition the WCC for resolution or whether he can just wait 60 days for the mediator's report to become final." (Order, ¶ 25.)

[2] The legislature amended the statute during the 2009 legislative session to add a section further clarifying the "determination by the department" language. The statute now has a subsection (3) which states "[a] mediator's report is not a determination by the department for the purposes of this section. A determination by the department is final if an appeal to mediation described in subsection (1) or a petition described in subsection (2)(a) is not filed within the required time period." § 39-71-520(2 (c), MCA (2009).

However, this interpretation misconstrues the plain language of the statute and does not establish unconstitutionality beyond a reasonable doubt.

1. The statute is clear and unambiguous.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (citations and internal quotation marks omitted). Here, the language of the statute is internally consistent and clear. From subsection (1) through subsection (2)(c), the statute consistently refers to the UEF's initial decision regarding benefits as "the determination by the department." *See* § 39-71-520, MCA (2005). Similarly, the mediator's report and recommendation is consistently labeled "the mediator's report." *See id.* There is no internal ambiguity; the language of the statute, and specifically its use of "the determination by the department," is comprehensible to a person of average intelligence. There are simply no grounds to hold this language unconstitutionally vague.

Going beyond the plain language of the statute to the overall statutory scheme of the Workers' Compensation Act demonstrates additional consistency. The WCC examined the statute's cross-reference to § 39-71-2411, MCA, and found its language supported Weidow's argument that "department" could refer to

the mediation unit of the Department of Labor and Industry. (See Order, ¶ 22.) However, close examination of § 39-71-2411 likewise reveals, while a claimant may petition "the department" for mediation, the mediator is treated separately from "the department" itself. *See* § 39-71-2411, MCA. Furthermore, throughout the statute, the mediator makes only a "recommendation" and files a "report;" the mediator does not make a decision or a "determination" regarding the underlying claim or dispute. *See id.* The only exception to this is when the mediator makes a "determination" regarding a party's level of cooperation during the mediation process. *Id.*, -2411(8).

The impropriety of confusing a mediator's report and recommendation with a "determination by the department" is further illustrated in § 39-71-2409, MCA, which sets forth the duties of a mediator. This statute clearly states a mediator may facilitate an exchange of information between the parties, assure all relevant information is brought forth, suggest possible solutions to the dispute, recommend a solution, and assist the parties voluntarily to resolve their dispute. § 39-71-2409, MCA. Nowhere does it state a mediator may make "a determination." Clearly, this function is reserved for other units of "the department," in this case, the UEF.

2. Howard's and the UEF's interpretation is reasonable.

Additionally, as discussed above, the capability to interpret a statute or a term within a statute in more than one way does not automatically render that

statute unconstitutionally void. *See Montana Media, Inc.*, ¶ 58. Accordingly, even if this Court agrees with the WCC's conclusion that § 39-71-520(2), reasonably could be interpreted as Weidow argued, that is not sufficient to establish its unconstitutionality. Instead, this Court "is required to uphold the constitutionality of a statute when that can be accomplished by a reasonable construction of the statute." *Id.*. (emphasis added). "A reasonable construction" of § 39-71-520(2) is that "determination by the department" refers to the UEF's initial determination regarding casual employment and benefit denial. While another construction may be "reasonable," the fact that more than one reasonable construction may exist does not render the statute unconstitutional. "The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Powell*, ¶ 13.

Section 39-71-520(2) is only unconstitutionally vague "if a person of common intelligence must necessarily guess at its meaning." *Montana Media, Inc.*, ¶ 58 (emphasis added). The language of the statute is sufficiently clear, and reference to related statutes uniformly supports the conclusion that "determination by the department" refers to the decision by the UEF regarding coverage, not the "report and recommendation" authored by the mediator. While the statute may not

have provided "perfect clarity and precise guidance" as to Weidow's required conduct, such is not required for this Court to uphold a statute's constitutionality. *See Wing*, ¶ 14.

Accordingly, a person of common intelligence must not "necessarily" guess at the meaning of § 39-71-520(2). Indeed, rather than guess, a claimant who harbors doubts about whether an appeal to the WCC is necessary or advisable after receiving the mediator's recommendation has the option of contacting any of the involved branches of "the department" – the UEF, the mediator, or the WCC – to determine the next procedural steps required to maintain his or her claim. Additionally, in situations similar to this case where the UEF's determination is adverse to the claimant and the mediator's recommendation is not, the receipt of the UEF's letter to the mediator stating it does not intend to change its earlier determination denying benefits at the least places the claimant on notice that a dispute exists and an appeal by filing a petition to the WCC may be necessary.

Moreover, § 39-71-520(2), MCA (2005), specified a standard of conduct for Weidow. *See Wing*, ¶ 14 ("We deem a statute to be unconstitutionally vague if it specifies 'no standard of conduct' at all.") (citations omitted). It required a claimant who disagreed with "the determination by the department" to file an appeal within 60 days of the mailing of the mediator's report. § 39-71-520(2)(b), MCA (2005). Indeed, it permitted an extension of that time period through a

stipulation should the claimant or insurer be uncertain an appeal is necessary. *Id.* Considering the options to extend the time required and the simple remedies available to eliminate any unlikely confusion, there is a constitutionally sufficient standard of conduct defined in § 39-71-520(2).

Essentially, Weidow argues his subjective confusion about which party is required to file an appeal within the 60-day time limit renders the statute unconstitutional. However, considering his alleged confusion could only arise under certain special circumstances;[3] he or any other claimant in the same circumstances is timely placed on notice that the UEF's original determination remains controlling; the time limit is readily extendable if necessary; and any confusion could readily be cleared up with a simple inquiry to any branch of "the department," § 39-71-520(2) cannot, as a matter of law, be considered unconstitutionally vague. The WCC's Order denying summary judgment therefore must be reversed.

II. Weidow falls under the casual employment exception to workers' compensation coverage, as defined in § 39-71-116(6), MCA, so Howard is not required to provide coverage.

The WCC's conclusion that Weidow's work activity for Howard was not "casual employment" is incorrect. Section 39-71-116(6) defines "casual

[3] In fact, the WCC rejected a different claimant's argument that § 39-71-520(2), MCA was void for vagueness because the exact same circumstances did not exist in that case. *See Benton v. UEF*, 2009 MTWCC 37, ¶¶ 11-13 (holding the "ambiguity" which formed the basis of the WCC's finding of unconstitutionality in *Weidow* was not present and finding § 39-71-520(2), MCA, is not unconstitutionally vague as applied to that case).

employment" as "employment not in the usual course of the trade, business, profession, or occupation of the employer." § 39-71-116(6), MCA. This Court has noted the "'line of demarcation between what is and what is not employment in the usual course of trade, business, profession, or occupation of the employer is vague and shadowy.'" *Colmore*, ¶ 22 (quoting *Nelson v. Stukey*, 89 Mont. 277, 286, 300 P. 287, 288 (1931)). Accordingly, the Court's identification of an employer's usual course of trade, business, profession, or occupation "must be made on a case-by-case basis and a single employer may, in fact, have more than one trade or business." *Id.*

While the Act does not define "course of trade, business, profession, or occupation," this Court has noted "that the word 'business' means the 'habitual or regular occupation that a person [is] engaged in with a view to winning a livelihood or gain.'" *Id.*, ¶¶ 18, 19 (citations omitted). In *Colmore*, this Court discussed the importance of profit motive when determining an employer's usual course of trade or business:

> "We do not believe it is necessary to come within the Workmen's Compensation Act that the 'employer' must make a profit but we do believe the profit motive is an important characteristic of an operation such as the one we are here considering in order for the operation to come within the designation of a trade, business, profession or occupation."

Id., ¶ 28 (quoting *Barlow v. Anderson*, 346 S.W.2d 632, 634 (Tex. Civ. App. 1961)). Also in *Colmore*, this Court made an express finding identifying the

employer's business – running an agricultural operation – and stressed the importance of the claimant's employment being "in the course of [the employer's] agricultural business." *Id.*, ¶¶ 25, 26.

Accordingly, the *Colmore* decision clarifies the otherwise "vague and shadowy" nature of "usual course" of trade or business, setting forth standards for the WCC to follow when considering whether an employee falls under the casual employment exception to coverage. *Colmore* directs the WCC (1) to identify the type or nature of the employer's business; (2) to evaluate whether the claimant was working in furtherance of that business; and (3) to determine whether the business was operated with a profit motive. *See id.*, ¶¶ 29-32.

In this case, the WCC completely failed to examine two of these three factors, and its conclusion that Howard and/or the Trust purchased and developed his Montana vacation home with a profit motive is not supported by substantial credible evidence. Accordingly, the WCC's conclusion of law that Weidow did not fall under the casual employment exception to worker's compensation coverage was incorrect and must be reversed.

A. Although the WCC did not address or identify Howard's "usual course" of business, the record reflects his vacation home was not part of it.

In its Findings of Fact and Conclusions of Law, the WCC states the following:

> As reflected in Howard's testimony and in his tax returns, Howard used his Montana properties as part of a "business" as defined in *Colmore*: "with a view to winning . . . a gain." While Howard did not develop the Yellowstone Club property solely for business purposes, the statute and case law does not require that he do so, but only that it be part of his usual course of trade, business, profession, or occupation. I conclude that Howard's use of the Yellowstone Club property, particularly in his use of that property for advantageous tax purposes, was part of Howard's usual course of trade, business, profession, or occupation.

(FFCL, ¶ 96.) The WCC failed actually to identify Howard's business, and its application of this Court's definition of a "business" is incorrect. An examination of the record shows the vacation home was not ever a part of Howard's business, regardless of the existence of his other real and personal property within Montana.

The WCC mentioned in its findings of fact that Howard manages and sells real estate through both Jackbilt and Classic Properties. (Id., ¶ 31.) Through Jackbilt, Howard manages about 70 different properties of an obvious commercial nature. (Id.) Howard's other business, Classic Properties, is a real estate agency operating with one other agent in California. (Id., ¶ 32.) In contrast, the Trust was created to hold Howard's personal assets, including real estate. (Id., ¶ 33.) The Montana vacation home is one of the assets owned by the Trust. (Id.)

Accordingly, the record clearly demonstrates that Howard's business, trade, or occupation is commercial property management and real estate sales in California. In contrast, the Trust is not associated with Howard's usual course of business and does not hold his business assets. In fact, the Trust holds many assets

which are clearly non-business related and not income-generating, such as the Howards' other personal residences and other personal property. (See Trial Ex. 13-49 (attached as App. 4).)

However, Howard's general business is inconsequential to this analysis. In *Colmore*, the Court remarked on a previous case in which a dentist also was engaged in the business of being the owner and operator of a 15 unit apartment complex. *Colmore*, ¶ 24 (citing *Nelson*, 89 Mont. at 288-89, 300 P. at 289-90). The Court emphasized that the employer's "existing business" – the business in which the claimant was engaged – is the only relevant inquiry. *Id.*, ¶ 25 (stating Colmore hired the claimant "to complete a task that was in furtherance of his existing business – running an agricultural operation" and noting "[t]he fact that Colmore may have been engaged in other businesses . . . is inconsequential in our analysis").

Accordingly, it is crucial in this analysis accurately to demarcate and define Howard's activities related to his Montana vacation home – the only property owned by or associated with Howard and the Trust on which Weidow was working when he was injured. All of the testimony from credible witnesses including Howard's own testimony, shows that the home was always intended to be a personal vacation residence, not a rental or built to flip or for resale. Howard characterized the property as follows: "the lot was never, ever, ever intended to be

a rental. And my attitude was I wanted to have the property for generations downstream." (Trial Transcript, at 63:6-8). While Jackbilt employees on two occasions assisted Howard with his vacation home, the WCC found those employees had taken time off from Jackbilt to do so and were paid with Trust assets. (Order, ¶¶ 38-40.) There is no evidence linking the vacation home to any aspect of Howard's other businesses. This is because the vacation home simply was not business related.[4]

The WCC's attempt to equate Howard's use and treatment of the Big Sky condominium with the vacation home is flawed and unsupported by the record. The WCC apparently believes that because Howard enjoyed some personal use of the condominium he likewise enjoyed some business use of the home. The WCC's tenuous comparison of the condominium use to the vacation home use was for the purpose of extending Howard's "business, trade, or occupation" to both of his properties in Montana. However, a close examination of the record shows the condominium and the vacation home were and are fundamentally different and cannot be lumped together to craft a "business" for Howard in relation to the vacation home itself. Indeed, Howard's condominium is not at all relevant to the question of whether Weidow falls under the casual employment exception to workers' compensation coverage, particularly because Weidow never worked on

[4] The WCC's analysis of the tax treatment of the vacation home is discussed below.

Howard's condominium, and certainly was not injured while working on the condominium. Nonetheless, because the WCC discussed the condominium at length in its Findings of Fact and Conclusions of Law, Howard's interest and use of that property is addressed here.

Howard purchased the Big Sky condominium in 2004, after buying the Yellowstone Club lot. (FFCL, ¶ 36.) He acquired the condominium through a real estate trade by exchanging a piece of rental property he owned in Bakersfield, California. (Id.) At the time, he was not sure he would build on the property because his wife was unenthusiastic about the prospect. (Id.) Therefore, he used the condominium as a base to ski while convincing her to build their family vacation home, and, later, he used the condominium as a place to stay while the vacation home was under construction. (Id.) Howard's tax returns list the condominium on Schedule E as a business property as a result of the real estate exchange. (Id., ¶ 37.)

The WCC compared Howard's tax treatment and use of the condominium to his tax treatment and use of the vacation home to show that both were business properties. The WCC concluded that, because the condominium was treated as a business property, even though Howard used it for personal use, the vacation home also should be considered a business property. However, Howard clearly testified his intent regarding the two properties was vastly different from the moment he

acquired each. The record on appeal supports this. In contrast to Howard's clearly stated intent regarding the vacation home, when discussing the condominium Howard testified:

> [i]t was intended to displace the money from Bakersfield into there. And then once I get this house done and I'm in there, move it out and either, A, keep it rented there, [or B,] do something with it to carry on with what I had done in Bakersfield.
>
> * * * * *
>
> [My intent was] [t]o acquire the property, solve an immediate need that became a personal need. But on the backside of the coin, as far as the condo is concerned, to be able to put that into a rental situation after I needed it no more, or sell it if the market – if there was a market there, sell and pay the taxes on it and be done with it.

(Trial Transcript, at 63:23-64:2, 64:15-21.) While Howard's use and tax treatment of the condominium may not have allowed for a 100% deduction of expenses related thereto under Schedule E, it is undisputed Howard's intent regarding the condominium was in fact either to rent it or to "flip" it into another business property. No similar evidence exists in the record with respect to the vacation home where Weidow was injured.

Just as clearly, it is undisputed that Howard's intent regarding the vacation home was never to use it to make a profit. He intends that property to be an heirloom – something his family will enjoy for generations. His inadvertent realization of a very small tax advantage by deducting the property taxes associated with it from his 2005 income taxes does not change this fundamental

truth. Howard's accountant erroneously categorized the vacation home on his tax returns for two years – during which time there was no habitable structure on the property. This error was corrected as soon as Howard became aware of it. All evidence points to one conclusion: unlike his condominium, which was never intended to remain a personal residence, no part of Howard's interest in the vacation home was business-related.

B. No evidence suggests Weidow was working in furtherance of Howard's business.

The second factor this Court set forth in *Colmore* to aid in determining whether an employee falls under the casual employment exception to workers' compensation coverage is whether the employee was hired to perform a task that was in furtherance of the employer's business. *Colmore*, ¶¶ 25, 26, 30. The WCC made no findings related to how Weidow's work on the vacation home was in furtherance of Howard's "business" there. In fact, the uncontested facts demonstrate (1) Weidow began working for Howard directly in March 2006, (2) the vacation home was treated as a personal home on Schedule A of Howard's tax returns for the 2006 tax year, and (3) other than a property tax deduction that could have been realized under Schedule A, there were no additional business expense deductions taken in relation to the construction or maintenance of the vacation home.

A comparison of the facts of Weidow's employment for Howard to the facts in *Colmore* illustrate that Weidow was not in any way working "in furtherance" of Howard's business, whatever it may have been. *Colmore* involved a semi-retired farmer from Tennessee who, through Colmore Properties, purchased ranch land near Livingston. *Id.*, ¶¶ 5-6. Colmore individually leased the ranch from Colmore Properties for "agricultural purposes." *Id.*, ¶ 7. Colmore engaged in various ranch operations, including leasing pasture land to area ranchers for grazing purposes. *Id.*, ¶ 30. Colmore was therefore responsible for maintaining the fences on the property. *Id.* The claimant was killed while replacing and repairing fencing on Colmore's ranch, where he "was employed to work for Colmore in the course of his agricultural business. . . ." *Id.*, ¶¶ 26 -27. Colmore had hired at least two other people to work on the fences in addition to the claimant. *Id.*, ¶ 26. Moreover, he allowed a local rancher to run horses on his property in exchange for a corral and a horse and for keeping an eye on the horses and property while Colmore was absent from the property. *Id.*

Clearly, these facts establish that the claimant in *Colmore* was indeed working directly in furtherance of Colmore's agricultural business. If not for Colmore's business responsibilities on the ranch, the claimant would not have been hired to repair the fences. Nothing close to these facts exists in this case.

Additionally, at the time Weidow was working on Howard's home and receiving income from Howard through the Trust in 2006, the Montana vacation home was, both in intent and as later reflected on Howard's tax returns, purely a personal vacation home and not a business property. Because the home was maintained separately from Howard's other business rental or commercial properties at the time relevant to Weidow's claim, Weidow cannot argue he was working in furtherance of Howard's business. Therefore, Howard should not be required to provide workers' compensation coverage for Weidow. *See Colmore*, ¶ 27 (discussing *Vogl v. Smythe*, 74 Idaho 115, 258 P.2d 355, 357 (1953)).

C. The Montana property is a vacation home and was not purchased or developed with a profit motive.

The third and final factor identified in *Colmore* as relevant to the determination of whether an employee falls under the casual employment exception is whether the "business" in which the claimant is employed was operated with a profit motive. *See id.*, ¶¶ 31, 32. This Court in *Colmore* opined that profit motive was perhaps "most significant[ ]" in the casual employment determination. *Id.*, ¶ 31. The WCC relied exclusively on this factor to conclude that "Howard's use of the Yellowstone Club property, particularly in his use of that property for advantageous tax purposes, was part of Howard's usual course of trade, business, profession, or occupation." (FFCL, ¶ 96.) Not only was the

WCC's exclusive reliance on this factor improper, but also the conclusion the WCC drew is not supported by substantial evidence.

The overwhelming evidence demonstrates Howard's lot was originally purchased to build a winter vacation home for the Howard family in Montana. Howard testified "that he never intended to use the property as a rental, but intended to use it as a personal vacation home for his family and friends." (Id., ¶ 49.) Every other witness expressly found credible, stated the same thing: the Montana home was always intended to be a vacation residence for Howard's family. (Id., ¶¶ 54, 55, 56, 58).

Yet, the WCC concluded that the vacation home was "part of a 'business' as defined in *Colmore*: 'with a view to winning . . . a gain.'" (Id., ¶ 96.) This conclusion is incorrect, and it is not supported by substantial credible evidence. *See Schmill*, ¶ 8 ("Substantial credible evidence is 'evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.'") (citation omitted). The record shows the WCC relied on a mere scintilla only – Howard's 2004 and 2005 tax returns – to determine the vacation home was a business under *Colmore*. The analysis below establishes the other evidence cited by the WCC is not relevant to this issue, and the tax returns the WCC found probative deserve little weight.

The primary evidence on which the WCC based its conclusion is Howard's 2004 and 2005 tax returns. Howard purchased the lot in 2004, and he and his accountant, Mr. Becker, both testified that the property was mistakenly placed on Schedule E of those returns due to a lack of direct communication between them. While Howard hired Brickowski to begin constructing the home in 2004, Weidow did not start working on the home directly for Howard until 2006. For the 2006 tax year, the Montana vacation home was correctly listed on Schedule A of Howard's tax returns after correction. The WCC discounts this change because it occurred after this litigation began. However, that the mistake was not brought to Howard's attention until litigation should not detract from the fact that he corrected it promptly.

Moreover, Howard realized a total tax benefit of approximately $2,000 in the 2004 and 2005 tax years. In comparison, Howard purchased the lot for $1,143,489, and then spent additional monies to build a family vacation home on the lot. Considering the size of Howard's and the Trust's tax returns and his overpayment in those years, not to mention the amount spent on the property and home construction, a minimal tax deduction on Schedule E for property tax of the undeveloped lot does not rise to "substantial evidence" necessary to conclude Howard purchased and developed his Montana vacation home with a profit motive. That Howard did not take full advantage of Schedule E treatment by deducting

other "business" expenses during the construction phase which would have provided significantly more beneficial tax treatment is wholly ignored by the WCC in discerning Howard's personal intentions for the home.

The other basis for the WCC's "profit motive" conclusion is Howard's use and tax treatment of his Big Sky condominium. Howard's ownership through the Trust of two properties in Montana does not mean those properties should be considered a single business or entity. This is especially true considering Weidow never worked on Howard's condominium – his only employment was on the home. Howard completed the 1031 exchange to acquire his condominium after purchasing the Yellowstone Club lot. Clearly, he did not intend the condominium to become his family's vacation home. He bought the condominium in part because of his wife's initial reluctance to build a family vacation home on their lot. The record mandates the conclusion that the condominium was intended from the beginning to be either a short-term investment or a rental property once Howard was able to move into his completed vacation home. These distinct properties were acquired for different reasons and purposes, and any minor similarity of Howard's mistaken tax treatment of them is not probative of the issue of whether Howard possessed a profit motive associated with his vacation home.

The only other evidence which the WCC cited to conclude Howard had a profit motive in his Montana vacation home relates to his airplane. Howard

testified his airplane, which is registered to the Yellowstone Club address and is housed in a hangar in Big Sky, was reported on his tax returns as used 60% for business use and 40% for personal use. (FFCL, ¶¶ 52, 53.) While he does take advantage of tax savings from housing the airplane in Montana instead of California, this fact is not relevant to an evaluation of whether he had a profit motive in purchasing or developing his Montana vacation home. (Id.) As Howard stated in his testimony, he is permitted to own property in any state of the Union, and his residence in Montana enables him to take advantage of Montana's lack of sales tax on a large purchase, such as his airplane. (Trial Transcript, at 107:13-19, 108:23-109:4.) Legally taking advantage of Montana's lack of sales tax is not relevant to or evidence of any profit motive in owning or developing residential property within Montana.

Likewise, the Trust's ownership of the plane and the Montana properties does not establish a profit motive, for the Trust is not a business entity created to earn income, manage rental properties, or sell real estate. It is a legal device used to hold assets and eventually to transfer ownership to beneficiaries. Inheritance or estate tax benefits are not evidence of a profit motive in relation to an employer's usual course of trade, business, profession, or occupation.

The inadequacy of the evidence relied upon by the WCC to support its flawed conclusion of a profit motive is illustrated by comparing opposite facts

present in *Colmore*. In concluding that Colmore ran his ranch with a profit motive, this Court noted that "he deducted all of the expenses of running the ranch as 'business' expenses on his Federal Income Tax Return." *Colmore*, ¶ 28. Those deductions added up to $140,983 in 2000 alone, based on the agricultural deductions and depreciation claimed for both his Montana and Tennessee farming operations. *Id.*, ¶ 31. Significantly, Colmore "claimed deductions for the rent he paid to lease the ranch, depreciation on the farm equipment, . . . for payment of Montana taxes . . . [and] for expenses incurred from repairing the fences on the ranch." *Id.* Accordingly, not only is the amount of tax benefit realized by Colmore as compared to Howard substantially different, but also Colmore deducted expenses from the very activity the claimant in that case undertook while employed by Colmore. Howard's tax benefit resulted solely from a deduction related to his property taxes – he did not deduct any other expenses incurred from constructing the home. (See Trial Ex. 14-385 (attached as App. 5).)

As stated above, "[s]ubstantial credible evidence is 'evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.'" *Schmill*, ¶ 8 (citation omitted). Here, not only is the WCC's overall conclusion that the Montana vacation home was part of Howard's business incorrect, but the WCC's findings regarding Howard's profit motive are not

supported by substantial evidence. The only evidence on the record which is arguably relevant to Howard's profit motive is his 2004 and 2005 tax returns, and these offer no more than a scintilla when compared to the amount of evidence supporting the opposite conclusion. Therefore, Howard asks the Court to reverse the WCC's conclusion and find Weidow did indeed fall under the casual employment exception to workers' compensation coverage as defined in § 39-71-116(6), MCA, when he was injured in 2006.

CONCLUSION

For the reasons stated above, Howard respectfully asks this Court to reverse the WCC.

Dated this 28th day of May, 2010

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By _____
G. Andrew Adamek
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of May, 2010, I mailed a true and correct copy of the above and fore going APPELLANT'S OPENING BRIEF, by the United States Postal Services, postage prepaid, addressed to the following counsel of record:

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_____
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that APPELLANT'S OPENING BRIF, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 9,921 words.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By _____
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